In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-818

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED, PETITIONER

v.

ROBERT F. FROEHLKE, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In June 1971, the Army issued an Invitation for Bids for the procurement of 81 milimeter cartridges to be delivered to Vietnam, commencing in April 1972 (Hill affidavit of October 23, 1971).[1] The contract was FOB origin, with the Army paying the actual shipping cost from the place of manufacture to Vietnam. Each bidder was "requested" to submit "Guaranteed Maxi-

[1] The various affidavits referred to herein were introduced by the Government below and are a part of the record in this case.

mum Shipping Data" for purpose of estimating the Army's transportation cost. If the actual shipping cost to the Army exceeded the estimated cost under the winning bid, it was agreed that the successful bidder would reimburse the Army for the difference (by a deduction from the contract price).[2] Nine firms, including petitioner, responded to the Invitation.

Upon evaluating all the bids, the Army decided to award the contract to Maxson Electronics Corporation ("Maxson") (Hill affidavit of October 14, 1971). Petitioner then lodged a protest with the Army and the Comptroller General (Hill affidavit of October 14, 1971). Shortly thereafter, on September 30, 1971, it commenced the present suit in the United States District Court for the Western District of Tennessee, seeking to enjoin the award on the ground that Maxson's

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[2] The Invitation for Bids stated:

GUARANTEED MAXIMUM SHIPPING DATA FOR F.O.B. ORIGIN DELIVERIES

The offeror is requested to complete the following Guaranteed Maximum Shipping Data for use in determination of transportation costs. If the offeror does not furnish sufficient shipping data as set forth in the Guaranteed Maximum Shipping Data to permit determination by the Government of the item shipping cost, evaluation will be based on the highest transportation cost producing shipping data submitted by any offeror or, in the absence thereof, as may otherwise be established by the Government. If the item shipping cost based on actual shipping data exceeds the item shipping cost as computed from the data indicated below or as set forth above for evaluation purposes, the offeror agrees that the contract price shall be reduced by an amount equal to the difference between the transportation costs computed for evaluation purposes and the transportation costs that should have been used for evaluation purposes based on correct shipping data.

bid contained deliberately inaccurate shipping data,[3] and hence that the Army's acceptance of it was unlawful.

The district court preliminarily enjoined the Army from awarding the contract to Maxson.[4] Respondents promptly moved to vacate that order, informing the court that each day of delay aggravated an already acute shortage of ammunition for American combat troops in Vietnam and resulted in increased costs to the government (Hill affidavit of October 23, 1971). The district court refused to vacate and to require petitioner to post bond.

Respondents appealed, requesting summary reversal of the preliminary injunction. In supplemental affidavits filed with the court of appeals, they advised that the delay in awarding this contract, coupled with new ammunition shortages arising from the failure of another producer, had forced the Army to exercise an option under an existing ammunitions contract on terms not nearly so favorable as those under the Maxson contract. The additional costs incurred would be well over one million dollars. See Hill affidavits of December 3 and December 6, 1971; Hinrichs affidavit of December 2, 1971.

The court of appeals remanded the case to the district court with directions to vacate the preliminary

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[3] Maxson submitted cost data for 4" wooden pallets needed in the transportation, rather than using the 6⅛" wooden pallets called for in the Invitation for Bids.

[4] The district court orally announced the preliminary injunction on October 22, 1971. The written order to that effect was not actually entered until November 1, 1971 (Pet. App. A-8).

injunction. The Sixth Circuit held (Pet. App. A-13) that the district court had "abused its discretion in not vacating the injunction upon the representation by the Secretary of the Army that the National welfare will be materially affected by the injunction." It stated (*ibid.*): "On the basis of the affidavits on file we find the National interest to be of such overriding importance as to render the failure to vacate the injunction an abuse of discretion."

The court of appeals denied a petition for rehearing, and ordered that the mandate issue on December 29, 1971, unless stayed by this Court (Pet. App. A-20). On December 22, 1971, Mr. Justice Stewart, and on December 30, 1971, the Chief Justice, denied a stay.

1. Petitioner seeks to reinstate the district court's preliminary injunction against an award to Maxson of the ammunitions contract involved in this case. But, following issuance of the mandate of the court of appeals on December 29, 1971, after Mr. Justice Stewart denied a stay, the Army awarded the contract to Maxson. Thus, the issue raised in the petition is now moot; there is no cause for review by this Court.

2. Moreover the court of appeals properly determined that the district court—by failing to give sufficient weight to Army affidavits showing the substantial harm to the national interest that would result from preliminarily enjoining consummation of the munitions contract with Maxson—abused its discretion in refusing to vacate the preliminary injunction. Respondents' affidavits explained that there was a shortage of this type of ammunition in Vietnam, that it was only available in limited quantity, and then only at a much higher cost. Petitioner does not dispute

these facts; it merely objects that the court of appeals relied on them. But, as that court pointed out (Pet. App. A-13), petitioner has not "cited any authority in which any Court of the United States has enjoined the acquisition of munitions after a responsible officer has certified such munitions as necessary for support of troops engaged in military operations."

Nor was there reason for any such injunction in this case. Maxson's bid price was understated only in terms of the shipping costs. But since bidders guaranteed the maximum shipping cost (*supra*, n. 2), this error had no bearing on the overall cost to the Army; Maxson had to pay the additional transportation expense.[5] It was, therefore, not improper for the Army to accept Maxson's bid notwithstanding the error.[6]

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[5] Recent opinions of the Comptroller General have held such variations in shipping costs to be immaterial. *E.g.*, B-153323 (May 7, 1964); B-165181 (Nov. 25, 1968); B-164868 (Nov. 22, 1968); B-167946 (Feb. 17, 1970); B-167868 (Apr. 22, 1970); B-172899 (Aug. 23, 1971, reaffirmed on reconsideration, Nov. 12, 1971). These opinions were attached to the "Government Appellants' Reply to Appellee's Opposition to Motion for Summary Reversal, Etc.," filed in the court of appeals.

[6] Petitioner contends (Pet. 11-12) that the decision below conflicts with decisions by the District of Columbia Circuit recognizing "the right of a disappointed bidder to seek review of agency action" under the Administrative Procedure Act (5 U.S.C. 706). See *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F. 2d 859 (C.A. D.C.); *Wheelabrator Corporation* v. *Chafee*, C.A.D.C., No. 24,705, decided January 26, 1971. Whatever view one takes of those decisions (see, *e.g.*, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113), however, this is not a proper case in which to review the jurisdictional question that they decided. Here, the Sixth Circuit explicitly stated (Pet. App., A-13): "We need not and do not reach the issue of whether the District Court had jurisdiction to issue the injunction pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 706, at the request of [petitioner] as a disappointed bidder."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

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